RECORD
AND
BRIEFS

Supreme Court, U.S
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No. 10-1019

IN THE

Supreme Court of the United States

ABBYY PRODUCTION, LLC,
Petitioner,

v.

NUANCE COMMUNICATIONS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where a Hague Convention signatory state has refused to comply with the Convention, may a federal district court authorize service of process upon a corporation located in that foreign state "by other means" under Rule 4(f)(3) and (h)(2) of the Federal Rules of Civil Procedure?

2. Does a complaint allege sufficient facts to support personal jurisdiction by a California federal district court over a defendant foreign corporation where that corporation shipped master copies of software to its California-based affiliate pursuant to a licensing agreement with the California affiliate, is under common control with the California affiliate, and publicly stated its intent to sell its products in the U.S. market?

RULE 29.6 STATEMENT

Respondent Nuance Communications, Inc. (NASDAQ symbol: NUAN) has no parent company, and no publicly held company owns 10% or more of its stock.

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v.

NUANCE COMMUNICATIONS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Nuance Communications, Inc. ("Nuance") respectfully submits this brief in opposition to the petition for a writ of certiorari. Contrary to the assertion of Petitioner Abbyy Production, LLC ("Petitioner" or "Abbyy Production"), the Federal Circuit's decision below addressed two issues (one novel and the second fact-bound) that do not implicate conflicts of authority with any decision of other circuits or this Court and thus do not warrant this Court's review.

The first issue is whether a federal court, upon a showing that a Hague Convention signatory state (here, the Russian Federation) has refused to follow the Convention, may authorize service upon a corpo-

ration of that foreign state "by other means" under Rule 4(h)(2) and 4(f)(3) of the Federal Rules of Civil Procedure. Contrary to Petitioner's assertions, no circuit has ever addressed this question except the Federal Circuit in the decision below. The Federal Circuit's affirmative answer is supported by the Advisory Committee Note to Rule 4 and accords with every district court decision to have addressed the issue.

The second issue is whether a foreign corporation's transmission of master copies of software to its U.S. affiliate supports personal jurisdiction where that corporation has numerous additional contacts with the U.S. forum, including common control and a licensing agreement with its California-based affiliate as well as the publicly stated intent to sell its products in the U.S. market. Here too there is no conflict among the circuits, and in any event the Federal Circuit's determination that personal jurisdiction was established over Abbyy Production rested upon multiple factual bases that make this case a poor vehicle for considering the question Petitioner seeks to present.

Neither question warrants this Court's review and the petition should be denied.

COUNTERSTATEMENT

1. Nuance owns patents relating to "methods and systems for performing optical character recognition, recognizing documents, and managing documents." Pet. App. 12a. In February 2008, Nuance filed suit against Abbyy USA Software House ("Abbyy USA") and another defendant in the U.S. District Court for the Central District of California, alleging patent infringement. Pet. App. 11a-12a. Abbyy USA is a California corporation with its principal place of

business in Fremont, California.[1] The case was subsequently transferred to the Northern District of California (White, J.). *Ibid.* In answering interrogatories concerning its corporate affiliates, Abbyy USA identified Abbyy Software, Ltd. ("Abbyy Software"), a corporation organized under the laws of Cyprus, as its parent corporation and Petitioner Abbyy Production, a corporation organized under the laws of the Russian Federation, as another wholly-owned subsidiary of Abbyy Software. *Ibid.*

Nuance filed an Amended Complaint adding Abbyy Production and Abbyy Software as defendants. Nuance alleged that these new defendants had infringed directly, contributorily, or by inducement one or more claims of the patents-in-suit by making, using, selling, and/or importing into this country certain software products without Nuance's authorization. See 35 U.S.C. §§ 271(a), (b), and (c). In support of the court's personal jurisdiction over the new defendants, Nuance alleged, *inter alia*, that (a) Abbyy Software, Abbyy Production, and Abbyy USA belong to a family of companies that develops and sells software products including optical character recognition software; (b) the companies are overseen by a single "Global Management Team"; and (c) Abbyy Production's CEO, Sergey Andreyev, had told *Trade Secret Magazine* that the companies were launching "FineReader" software in the United States as an act of revenge against Nuance for its filing of the original complaint against Abbyy USA. Pet. App. 14a. See also C.A.F.C. J.A. 245 ("'They felt a threat on our behalf—and struck first. Now Americans demand us to present our software program code . . . .'").

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[1] Amended Complaint ¶ 4 (Apr. 3, 2009), *Nuance Commc'ns, Inc.* v. *Abbyy Software House*, No. 3-cv-02912 (N.D. Cal.).

Further, a 2007 license agreement between Abbyy Production and Abbyy USA—which was submitted by Abbyy Production in connection with its motion to dismiss—grants Abbyy USA a nonexclusive license to use, sell, reproduce, distribute, and market Abbyy Production's software in the United States. Pet. App. 16a. The agreement requires Abbyy Production to provide master copies of computer software programs to Abbyy USA, sale and service and other documentation for the software, and technical support. *Ibid.* In exchange, Abbyy USA must pay Abbyy Production "the net amount of sales, less costs, expenses, and an operating profit margin of 4.5%." *Ibid.*

On May 7, 2009, a process server in Moscow served the Amended Complaint, Amended Summons, and Standing Orders of the Court, along with Russian translations of these documents, by personal delivery on Ms. Nadezhda Kolpakova, the Manager of Abbyy Production. Pet. App. 12a-13a.

2. Abbyy Production moved under Federal Rule of Civil Procedure 12(b)(2) and (5) to dismiss the Amended Complaint for, respectively, lack of personal jurisdiction and improper service of process. Pet. App. 3a. The district court granted the motion. Pet. App. 2a.[2] As to service of process, the court

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[2] Although Abbyy Software did not move for dismissal based upon improper service of process, the district court *sua sponte* granted dismissal on this ground without separate analysis. Pet. App. 5a. The Federal Circuit reversed. Pet. App. 37a-38a. The Circuit also reversed the district court's holding that it lacked personal jurisdiction over Abbyy Software; the Circuit held that additional discovery into that issue is required. Pet. App. 26a-29a. Upon completion of that discovery, the district court denied Abbyy Software's motion. *Nuance Commc'ns Inc.*

reasoned that Nuance's personal service upon Abbyy Production in Moscow had not complied with the Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965 ("Hague Convention") 20 U.S.T. 361, T.I.A.S. No. 6638 (1969), which requires delivery of the complaint and associated documents to the central authority designated by the Russian Federation. Pet. App. 5a.

As to personal jurisdiction, the district court held that neither general nor specific personal jurisdiction was established. Pet. App. 7a-9a. In so holding, the court considered only whether the bare fact of corporate affiliation between Abbyy USA and Abbyy Production supported personal jurisdiction over Abbyy Production. Pet. App. 8a-9a. The court did not discuss the allegations that the companies are under common control, that Abbyy Production had announced its intent to enter the U.S. market in retaliation for Nuance's original complaint against Abbyy USA, or that Abbyy Production had licensed its software to the California-based Abbyy USA under the 2007 license agreement.

3. In an opinion authored by Chief Judge Rader, a unanimous panel of the Federal Circuit reversed. Pet. App. 11a.

a. Addressing service of process, the Circuit began by recognizing that Federal Rule of Civil Procedure 4(h) is the relevant provision governing service of process upon a foreign corporation, and incorporates most of Rule 4(f), which governs service upon foreign individuals. Pet. App. 30a. The Circuit next acknow-

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v. *Abbyy Software House*, No. C 08-02912, 2011 WL 1659574 (N.D. Cal. May 3, 2011).

ledged that, where the foreign corporation is located in a Hague Convention signatory state and service of process must be made in that state, such service must be made in compliance with the Convention, which is referenced in Rule 4(f)(1). *Ibid.* See also Fed. R. Civ. P. 4 Advisory Committee Note To Subdivision (f)(1) (1993) ("Paragraph (1) [of Rule 4(f)] gives effect to the Hague Convention . . . .").

Contrary to Petitioner's assertion, the Circuit did not "leav[e] the Hague Convention to the option of a U.S. litigant . . . ." Pet. 12. Rather, the Circuit recognized the mandatory character of the Hague Convention where the foreign corporation is located in a Hague Convention signatory state and service of process must be made in that state. Pet. App. 31a (the Hague Service Convention "*governs* service of summons on persons in signatory foreign countries" (emphasis added)) (citing *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 698 (1988)).[3] But the Circuit was faced with the situation of a signatory state, the Russian Federation, that has unequivocally repudiated its obligations under the Hague Convention with respect to U.S. plaintiffs. Pet. App. 31a. (The district court had not addressed this issue.) The Circuit found such a repudiation based upon specific evidence, including a U.S. State Department circular explaining that the Russian Federation "'unilaterally suspended all judicial cooperation with the United States in civil and commercial matters in 2003,'" (Pet. App. 31a-32a (quoting C.A.F.C. J.A. 316)), such that "'requests sent [via diplomatic channels or] directly by litigants to

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[3] Petitioner incorrectly states that the Federal Circuit issued its decision "without addressing this Court's decision in *Schlunk*." Pet. 6.

the Russian Central Authority under the Hague Service Convention are returned unexecuted.'" Pet. App. 31a (quoting C.A.F.C. J.A. 316) (alteration in original). The State Department thus warned that, "'in the absence of a direct channel for U.S. judicial assistance, U.S. courts and litigants will explore other methods to effect service of process' . . . ." Pet. App. 31a (quoting C.A.F.C. J.A. 317). Based upon these State Department pronouncements and a similar declaration submitted by Nuance, the Circuit held that Nuance was excused from "'the [S]isyphean task of attempting service through the Hague Convention procedures when a member state has categorically refused' to effect service." Pet. App. 32a (quoting *Arista Records LLC* v. *Media Servs. LLC*, No. 06-15319, 2008 WL 563470, at *1 n.4 (S.D.N.Y. Feb. 25, 2008)) (brackets in original).

Only after finding Hague Convention service futile did the Federal Circuit consider alternative methods of service under Rule 4(f), namely those prescribed by Rule 4(f)(2) and (3). Pet. App. 33a-34a.[4] The Circuit began with the method that Nuance had attempted: personal service in Moscow upon Abbyy Production.

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[4] Contrary to Petitioner's characterization, the Federal Circuit did not "broadly fashion[] a rule that will apply even if a Hague Convention signatory is cooperating . . . ." Pet. 10. Petitioner takes out of context the Circuit's statement that "'Rule 4(f)(3) is not subsumed within or in any way dominated by Rule 4(f)'s other subsections; it stands independently, on equal footing.'" Pet. 10 (quoting Pet. App. 34a). The Circuit made this statement *after* it had acknowledged the Hague Convention's mandatory character and excused Nuance from attempting Hague Convention service based on specific evidence of the Russian Federation's repudiation of the Convention; the Circuit was addressing the interplay between Rule 4(f)(2) and (3), and held that they are equally available to a plaintiff in this situation. Pet. App. 33a-35a.

Pet. App. 33a. The Circuit observed that such service would be appropriate under Rule 4(f)(2) if "prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction" (Pet. App. 33a), but the Circuit was reluctant to resolve that question of the Russian Federation's laws (Pet. App. 34a). Instead, the Circuit held that Rule 4(f)(3), which authorizes federal courts to direct service "by other means not prohibited by international agreements," was available and should be employed by the district court on remand. Pet. App. 34a, 37a. The Circuit ruled that one "other means" appropriate on the facts here would be so-called "substituted service" on Abbyy Production by serving its U.S. affiliate, Abbyy USA. Pet. App. 34a-35a. The Circuit acknowledged that such service must comport with due process, finding that requirement satisfied here because, *inter alia*, "the *Trade Secret Magazine* article reveals that Abbyy USA was effectively passing information about this lawsuit to Abbyy Production even before Nuance attempted to serve Abbyy Production." Pet. App. 37a. The Circuit also noted that "[s]ubstituted service under Rule 4(f)(3) has . . . been specifically used to serve litigants from the Russian Federation in multiple U.S. courts." Pet. App. 35a (citing, *inter alia*, *In re Potash Antitrust Litig.*, 667 F. Supp. 2d 907, 931-32 (N.D. Ill. 2009)).

b. The Federal Circuit also reversed the district court's ruling that it lacked specific personal jurisdiction over Abbyy Production. Pet. App. 17a. The Circuit observed that the law of the state in which the federal district court sits (here, California) provides the authority for personal jurisdiction, and that California's long-arm statute "is co-extensive with federal due process requirements."

Ibid. The Circuit then applied its three-part due-process test: "(1) whether the defendant purposefully directed activities at residents of the forum; (2) whether the claim arises out of or relates to those activities; and (3) whether assertion of personal jurisdiction is reasonable and fair." *Ibid.* The Circuit explained that, given the absence of discovery, it was required to resolve all factual disputes in Nuance's favor. Pet. App. 18a.

Addressing the first factor, the Circuit held that Abbyy Production had purposefully directed activities at the forum (California) not only because "this case features [a License] Agreement" (Pet. App. 21a), but also because the case involves "an expressed desire to 'win the whole U.S. market' by issuing ABBYY's FineReader software program in the United States, and the admitted distribution of that software to Abbyy USA, a California entity. Over ninety-five percent of the profits resulting from the sale of that software flow to Abbyy Production." *Ibid.* (citing C.A.F.C. J.A. 245). The Circuit also observed that "Abbyy Production has agreed to furnish Abbyy USA with new versions and updates of the Software, technical support, and oral and written consultations." Pet. App. 24a.

The Circuit held the second factor satisfied because "Abbyy Production provided copies of the accused software products to Abbyy USA, a California entity" (Pet. App. 22a), and, further, "[b]y operation of the Agreement, Abbyy Production retains ownership in the accused software even after that software enters California" (*ibid.*). "Under these facts," the Circuit concluded, "Abbyy Production has sufficient presence in the forum for importation under 35 U.S.C. § 271(a)." Pet. App. 22a.

Finally, the Circuit held that the third factor, which "applies only sparingly" (Pet. App. 18a), is likewise satisfied (Pet. App. 25a). In contrast to *Asahi Metal Industry Co.* v. *Superior Court of California*, 480 U.S. 102 (1987), which "involved an upstream supplier who did not create, control, or employ the distribution system that brought its goods (tire valves) to California" (Pet. App. 24a-25a (citing *Asahi*, 480 U.S. at 112-13)), here, "Abbyy Production established a distribution system with Abbyy USA that was intended to deliver products to the U.S. market via a commonly owned California entity" (Pet. App. 25a). The Circuit further reasoned that the fact that "Abbyy Production and Abbyy USA share the same counsel and operate under a consolidated Global Management Team . . . should ameliorate any possible burden of litigating in California." *Ibid.*

REASONS FOR DENYING THE PETITION

The petition should be denied because neither question presented implicates a circuit conflict or a conflict with a decision of this Court. The first question, concerning service of process on a foreign corporation in a Hague Convention signatory state that has repudiated the Convention, has to date been addressed only by the Federal Circuit below, which answered it correctly in accord with the view of the Federal Rules Advisory Committee and several district courts. The second question concerns a fact-bound application of well-settled personal jurisdiction law, and likewise implicates no decisional conflict. The interlocutory posture of this case (the Federal Circuit having reversed the grant of Abbyy Production's motion to dismiss) provides added reason why this Court should deny certiorari.

I. THE FEDERAL CIRCUIT'S SERVICE OF PROCESS HOLDING DOES NOT CONFLICT WITH DECISIONS BY OTHER CIRCUITS OR THIS COURT

The Federal Circuit recognized that the Hague Convention is a binding "treaty that governs service of summons on persons [and corporations] in signatory foreign countries." Pet. App. 31a (citing *Schlunk*, 486 U.S. at 698). Presented with specific evidence, including official pronouncements by the State Department, that the Russian Federation has repudiated its obligations under the Hague Convention in cases brought by U.S. plaintiffs, the Circuit held that Nuance is excused from making a futile attempt at Hague Convention service on Abbyy Production. Pet. App. 32a. Only then did the Circuit consider alternate methods of service under Rule 4(f)(2) and (3), ordering that the latter be considered by the district court on remand. Pet. App. 34a.

No other circuit besides the Federal Circuit below has yet addressed the situation of a Hague Convention signatory nation that has repudiated its obligations under the Convention. The lone circuit decision asserted by Petitioner to conflict with the decision below, *Brockmeyer* v. *May*, 383 F.3d 798 (9th Cir. 2004), did not involve a signatory nation that had refused to comply with its Hague Convention obligations. Rather, in *Brockmeyer*, the foreign corporation hailed from the United Kingdom (*id.* at 800), and there was no suggestion that the United Kingdom was disregarding its Hague Convention obligations. The issue in *Brockmeyer* was whether, in addition to the "standard" method of service under the Hague Convention (transmitting the summons and complaint to the United Kingdom's central authority

for service), a U.S. plaintiff could make service by international mail directly to the U.K. defendant's address in the United Kingdom. *Id.* at 800. The Ninth Circuit held that this alternative method was available under the Hague Convention so long as the receiving country did not object (*id.* at 803), but the court went on to hold that Rule 4(f) did not affirmatively authorize such service in the circumstances of the case (*id.* at 804-08).

Petitioner's assertion of a conflict between the decision below and *Brockmeyer* rests on petitioner's mischaracterization of the decision below as ignoring the "mandatory step" of Hague Convention compliance by the U.S. plaintiff. Pet. 15. See also Pet. 12 (describing the decision below as "leaving the Hague Convention to the option of a U.S. litigant"). In fact, the Federal Circuit below properly construed the Hague Convention as mandatory, but then excused compliance by Nuance only because Hague Convention service would be futile in the case of the Russian Federation. Pet. App. 32a. Again, the Circuit made this ruling based upon a specific evidentiary showing, which included an official U.S. State Department Circular stating that the Russian Federation had "'unilaterally suspended all judicial cooperation with the United States in civil and commercial matters in 2003'" (Pet. App. 31a-32a (quoting C.A.F.C. J.A. 316)), and that "'requests sent [via diplomatic channels or] directly by litigants to the Russian Central Authority under the Hague Convention are returned unexecuted,'" (Pet. App. 31a (quoting C.A.F.C. J.A. 317) (brackets in original)).

Petitioner also erroneously asserts a conflict between the decision below and *Schlunk*, 486 U.S. 694. *Schlunk*, like *Brockmeyer*, did not involve a

Hague Convention signatory state that had repudiated its obligations under the Convention. Rather, the question presented in *Schlunk* was whether the U.S. plaintiff, who had filed his case in Illinois state court, even needed to attempt service of the foreign defendant abroad (thus triggering the plaintiff's duty to make service under the Hague Convention) rather than in the United States (in which case the Hague Convention would not be triggered). *Id.* at 696. This Court held that the applicable method for service of process was supplied by Illinois law, and because that law authorized service of the foreign defendant by serving its U.S. subsidiary within the United States, the Hague Convention was not triggered. *Id.* at 707.

Given the absence of decisional conflict on this issue, this Court should deny certiorari and instead address the issue if and when a conflict arises. There is no reason to suspect, however, that such a conflict will arise. Every district court to have addressed the issue has, in accord with the decision below, excused the U.S. plaintiff from attempting Hague Convention service if there is a specific showing that the foreign signatory state has repudiated its obligations under the Convention. See, *e.g.*, *Arista Records*, 2008 WL 563470, at *2 ("[T]he record is plain that the Central Authority of the Russian Federation denies all requests for service of process originating from the United States. . . . Because there is no reason to believe that service would be effective if plaintiffs were required to serve [the defendant] in accordance with the Hague Service Convention procedures, substituted service pursuant to Rule 4(f)(3) is appropriate." (footnotes omitted)); *In re Potash Antitrust Litig.*, 667 F. Supp. 2d at 930 ("Court-directed service pursuant to Rule 4(f)(3) is particularly appropriate

where a signatory to the Hague Convention has 'refused to cooperate for substantive reasons.'") (quoting Fed. R. Civ. P. 4, Advisory Committee Note To Subdivision (f)(1) (1993)).

The decision below also finds support in the Advisory Committee Note to the 1993 amendments to Rule 4, which explains—in connection with the same subdivision (f)(3) upon which the Federal Circuit relied—that, in the case of a foreign signatory whose Central Authority "refus[es] . . . to serve a complaint seeking punitive damages or to enforce the antitrust laws of the United States . . . , the [federal district] court may direct a special method of service not explicitly authorized by international agreement if not prohibited by the agreement." Fed. R. Civ. P. 4, Advisory Committee Note To Subdivision (f)(3) (1993). See also *id.*, Note To Subdivision (f)(1) ("[T]here have been occasions when the signatory state . . . refused to cooperate for substantive reasons. In such cases, resort may be had to the provision set forth in subdivision (f)(3)."). This Note applies *a fortiori* here because the Russian Federation's Central Authority has not simply refused to serve certain types of U.S. plaintiffs' complaints, but has refused to serve all such complaints. Were the rule otherwise, and U.S. plaintiffs required to attempt the futile act of service upon the Russian Central Authority, then infringers would flock to the Russian Federation knowing that suits against them would be delayed while U.S. plaintiffs attempt futile service through the Russian Central Authority.[5]

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[5] Petitioner's separation-of-powers concerns (Pet. 12-14) are misplaced. *First*, the Federal Circuit did not rest its decision upon its own surmise, but rather relied on official pronouncements by the U.S. State Department in determining that the

II. THE FEDERAL CIRCUIT'S PERSONAL JURISDICTION HOLDING LIKEWISE IMPLICATES NO DECISIONAL CONFLICT AND INSTEAD INVOLVES A FACT-BOUND APPLICATION OF WELL-SETTLED LAW

Petitioner's second question presented—whether a foreign company's shipment of a master software copy to a nonexclusive U.S. licensee supports personal jurisdiction over the foreign company—similarly does not warrant this Court's attention because it does not implicate a conflict between the Federal Circuit and this Court or other circuits. Instead, the decision below engages in a fact-bound application of well-settled personal jurisdiction law.

A. The Decision Below Does Not Conflict With *Microsoft* Regarding Personal Jurisdiction Based Upon Supply Of Master Software Copies, And In Any Event This Case Is A Poor Vehicle To Resolve Any Such Conflict

Petitioner mistakenly asserts (Pet. 16-22) that the decision below conflicts with *Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437 (2007). *Microsoft* did not

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Russian Federation has repudiated its obligations under the Hague Convention regarding U.S. complaints. Pet. App. 31a-32a. *Second*, the Circuit did not purport to "abrogate" (Pet. 12) the Hague Convention, but rather prescribed a fair method for a U.S. plaintiff to proceed in the face of a foreign signatory's non-compliance. *Third*, Petitioner's proposed rule—that a "U.S. litigant should at least attempt to perform U.S. obligations under the Hague Convention" (Pet. 13)—does not involve Congress or the Executive any more than does the decision below, and instead requires the U.S. plaintiff to engage in a futile act with potentially harmful delay.

involve any question of personal jurisdiction. Rather, personal jurisdiction over the defendant (Microsoft) was not disputed, and the question presented was whether Microsoft could be held liable on the merits for violating 35 U.S.C. § 271(f)(1), which provides that infringement occurs "when one 'supplies . . . from the United States,' for 'combination' abroad, a patented invention's 'components.'" *Microsoft*, 550 U.S. at 441 (quoting § 271(f)(1)) (ellipsis in original). This Court held that Microsoft's supply of a master disk, which was then used abroad to create copies that were incorporated into computers made abroad, did not violate § 271(f)(1) because those copies were distinct from the master disk supplied from the United States. 550 U.S. at 442. This Court relied in large part on the fact that § 271(f)(1), as an "exception to the general rule that our patent law does not apply extraterritorially," should be narrowly construed. 550 U.S. at 442, 454-55.

Here, by contrast, personal jurisdiction is at issue, the alleged infringement is under §§ 271(a), (b), and (c), rather than § 271(f) (see Pet. App. 22a), and, given Abbyy Production's undisputed agreement to have its master copies imported into California by Abbyy USA (Pet. App. 21a), the presumption against extraterritorial application of the U.S. patent laws is inapposite. That the decisions do not conflict is corroborated by the fact that this Court's *Microsoft* decision endorsed the dissenting opinion of then-Judge Rader in the decision below in that case (see 550 U.S. at 452-53), and Chief Judge Rader authored the decision below here (Pet. App. 11a).

In any event, this case is a poor vehicle to address any question of personal jurisdiction relating to master copies: As petitioner grudgingly acknowledges (Pet. 7 n.2 (citing Pet. App. 21a)), the Federal Circuit below relied not only on the provision of master copies but also on several other facts, including (1) Abbyy Production has "expressed [the] desire to 'win the whole US market' by issuing ABBYY's FineReader Software program in the United States, and the admitted distribution of that software to Abbyy USA, a California entity" (Pet. App. 21a); (2) "[o]ver ninety-five percent of the profits resulting from the sale of that software flow to Abbyy Production" (*ibid.* (citing C.A.F.C. J.A. 245)); (3) "Abbyy Production has agreed to furnish Abbyy USA with new versions and updates of the Software, technical support, and oral and written consultations" (Pet. App. 24a); and (4) "by operation of the [License] Agreement, Abbyy Production retains ownership of the accused software even after that software enters California" (Pet. App. 22a). Such multiple factual bases for the personal jurisdiction decision below make this case a poor vehicle for reviewing Petitioner's alleged statutory and constitutional issue.

B. Petitioner's Asserted Conflicts Between The Decision Below And Other Circuit Decisions Are Illusory And Demonstrate The Fact-Bound Nature Of The Decision Below

Petitioner erroneously asserts (Pet. 20-22) that the Federal Circuit's personal jurisdiction ruling below conflicts with another decision by the Federal Circuit, *Red Wing Shoe Co.* v. *Hockerson-Halberstadt, Inc.*, 148 F.3d 1355 (Fed. Cir. 1998), and decisions by

the Sixth and Eighth Circuits, *Bridgeport Music, Inc.* v. *Still N The Water Publ'g*, 327 F.3d 472 (6th Cir. 2003); *Guinness Import Co.* v. *Mark VII Distrib., Inc.*, 153 F.3d 607 (8th Cir. 1998).

In *Red Wing Shoe*, which like the decision below was authored by then-Judge Rader, the court held that the federal district court in Minnesota lacked personal jurisdiction over the non-Minnesota corporation defendant where "[n]one of [the defendant's] licensees . . . [was] incorporated in Minnesota or has its principal place of business in that state" and the defendant "had no dealings with its licensees in that state." 148 F.3d at 1358. In the decision below, by contrast, Abbyy Production's U.S. affiliate (Abbyy USA) *is* based in the relevant state (California), and Abbyy Production entered into an agreement to provide master copies of software to Abbyy USA in California and "to provide assistance to Abbyy USA in selling, reproducing, and modifying the accused products in California." Pet. App. 19a. This and other fact-bound distinctions (see *supra*, at 17) illustrate that *Red Wing Shoe* and the decision below do not conflict on any issue of law that warrants this Court's attention.

In *Bridgeport Music*, the Sixth Circuit adopted "Justice O'Connor's stream of commerce 'plus' approach" from *Asahi* (see *Bridgeport Music*, 327 F.3d at 479-80 (citing *Asahi*, 480 U.S. at 112)), and then applied this approach to find that the federal district court in Tennessee lacked personal jurisdiction over a non-Tennessee defendant where the defendant merely knew that its licensee "distributes nationally and is likely to exploit [defendant's] compositions throughout the entirety of the United States, includ

ing in Tennessee" (*Bridgeport Music*, 327 F.3d at 480); there was no evidence that defendant's "advertising directly target[ed] or even actually reach[ed] Tennessee" (*id.* at 481); the defendant's affiliation with other organizations' Tennessee offices had concluded (*id.* at 483); and the defendant did not host a website with the expectation of making internet sales to Tennessee residents (*ibid.*). In this case, by contrast, Abbyy Production sent software and other services to its California-based U.S. affiliate, with which it is under common control, and Abbyy Production received the vast majority of the royalties from the U.S. affiliate's sales of the software. See *supra*, at 17. These factual differences explain why personal jurisdiction was found in the decision below but not in *Bridgeport Music*.

Guinness Import Company also does not conflict with the decision below. In that case, the Eighth Circuit held that the federal district court in Minnesota lacked personal jurisdiction over a defendant as to whom "[t]here was no evidence . . . to establish that [defendant] did anything *in* Minnesota." *Guinness Import Company*, 153 F.3d at 614. Additionally, there was no evidence that the defendant "exercised control over the distribution of its products in the United States or controlled the importer's decisions as to distribution." *Ibid.* In other words, the defendant and its distributors in *Guinness Import Company* were unrelated entities dealing at arm's length. In the decision below, by contrast, the Federal Circuit found that the relationship between Abbyy Production and Abbyy USA could *not* be described as involving "arms-length transactions between unrelated entities." Pet. App. 21a. Instead, "Abbyy Production and Abbyy USA [are] commonly owned sister companies operating under a consoli-

dated Global Management Team." *Ibid.* Additionally, in *Guinness Import Company*, title to the products passed in Jamaica and only thereafter did the distributors import the products into Minnesota (153 F.3d at 615); here, by contrast, "the record shows that Abbyy Production provided copies of the accused software products to Abbyy USA, a California entity," in California. Pet. App. 22a. Again, it is evident that Petitioner's asserted conflicts involve application of well-settled personal jurisdiction law to divergent facts, rather than a dispute over a legal question that merits this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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